

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILIN CORPORATION, a )  
California corporation, )

Plaintiff, )

v. )

WESTHOOD, INC., an Oregon )  
corporation, fka D.S. )  
PARKLANE DEVELOPMENT, INC. )

Defendant. )

No. CV-04-1228-HU

FINDINGS & RECOMMENDATION/  
ORDER

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1 - FINDINGS & RECOMMENDATION/ORDER

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4 Attorneys for Defendant

5 HUBEL, Magistrate Judge:

6 Plaintiff Philin Corporation brings claims against defendant  
7 Westhood, Inc., for declaratory relief, breach of contract, breach  
8 of fiduciary duty, and demand for corporate records. Westhood,  
9 having previously moved to dismiss the case as a sanction under  
10 Federal Rule of Civil Procedure 37, presently renews its motion.  
11 Additionally, all three of plaintiff's counsel have moved to  
12 withdraw as counsel for plaintiff. For the reasons explained  
13 below, I grant the motions to withdraw, and I recommend that  
14 defendant's motion to dismiss be granted with prejudice.

15 On September 12, 2006, I issued a Findings & Recommendation  
16 denying defendant's previous motion to dismiss under Rule 37, but  
17 granting, in part, defendant's alternative request for monetary  
18 sanctions in the form of attorney's fees. (Dkt # 113). Judge  
19 Jones adopted the Findings & Recommendation in a December 4, 2006  
20 Order (Dkt #136).

21 In my September 12, 2006 Findings & Recommendation, I  
22 thoroughly reviewed the history of the case, including my prior  
23 expression of concern regarding plaintiff's lack of diligence in  
24 prosecuting the case. The case record also reveals that while I  
25 continued to give plaintiff the benefit of the doubt and extended  
26 opportunities for plaintiff to comply with court orders, I  
27 expressed frustration and irritation at the very slow pace at which  
28 plaintiff was proceeding with its case and at what appeared to be

1 reluctance by plaintiff to provide relevant and material  
2 information to its counsel and to defendant.<sup>1</sup>

3 Although I previously concluded that plaintiff's actions did  
4 not warrant dismissal, I can no longer adhere to that conclusion.  
5 The following facts, developed immediately before and after the  
6 September 12, 2006 Findings & Recommendation, show that dismissal  
7 is the only appropriate sanction at this point.

8 Many of the relevant documents in this case are in Korean. A  
9 recurring issue has been the provision by plaintiff to defendant of  
10 English translations of documents. At a scheduling conference held  
11 June 13, 2006, I ordered plaintiff to complete the translation of  
12 documents by August 11, 2006. (Dkt # 78). The translations were  
13 to be ongoing, in the order proposed by plaintiff and concluding on  
14 August 11, 2006.

15 On August 11, 2006, plaintiff moved for an extension of time,  
16 to September 5, 2006, to complete the translations. Plaintiff  
17 cited a three-day illness of its translator as the basis for the  
18 motion. Additionally, plaintiff stated that it did not confer with  
19 defendant's counsel before filing the motion, as required by Local  
20 Rule 7.1(a), because of an earlier representation by defense  
21 counsel that it would not consent to additional requests by  
22 plaintiff to extend deadlines. In an August 15, 2006 Order, I  
23 allowed plaintiff's motion to extend the production deadline to  
24 September 5, 2006, although I noted the apparent lack of connection  
25 between the translator's three-day illness and the twenty-five day  
26

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27 <sup>1</sup> I have always intended my comments to be directed at  
28 plaintiff, as its counsel have continually been working  
diligently to move the case along.

1 extension requested by plaintiff. Aug. 15, 2006 Min. Ord. (dkt  
2 #105). I also noted, however, that given defendant's  
3 representation in response to the motion to extend the translation  
4 production deadline to September 5, 2006, that despite its earlier  
5 representation about not consenting to extension requests, it was  
6 presently not adverse to reasonable requests for extensions and  
7 would work with opposing counsel, plaintiff must comply with Rule  
8 7.1(a) on future extension motions. I also advised plaintiff that  
9 it would "need to hire additional translator(s) rather than expect  
10 any further extensions of deadlines should its translator be unable  
11 to complete the project by the newly extended date," which was a  
12 date selected by plaintiff. Id. The summary of the August 15,  
13 2006 Order in the docket sheet states unequivocally that the  
14 September 5, 2006 "deadline will not be further extended." (Dkt  
15 #105).

16 Despite my admonition in the August 15, 2006 Order, plaintiff  
17 sought another extension of time to produce the translated  
18 documents. The motion was filed on the due date, September 5,  
19 2006, and lacked the required conferral with opposing counsel.  
20 (Dkt # 109). On September 13, 2006, I denied plaintiff's motion  
21 for failure to properly confer with opposing counsel pursuant to  
22 Local Rule 7.1(a), and gave plaintiff leave to renew the motion  
23 after appropriate conferral. (Dkt #114). Plaintiff never filed a  
24 renewed motion. The only filings by plaintiff since September 13,  
25 2006, have been a response by plaintiff to defendant's objections  
26 to the September 12, 2006 Findings & Recommendation, a memorandum  
27 and affidavit in opposition to the renewed motion to dismiss by  
28 defendant, and the motions to withdraw, along with their supporting

1 affidavits.

2 Defendant seeks dismissal based on plaintiff's failure to  
3 comply with the August 11, 2006 Order that the translations be  
4 produced to defendant no later than September 5, 2006, and based on  
5 plaintiff's failure to properly confer with defendant before filing  
6 the September 5, 2006 motion to further extend the deadline,  
7 despite the Court's definitive statement that the September 5, 2006  
8 deadline would not be further extended.

9 Plaintiff argues that the motion should be denied because it  
10 has been diligent in pursuing the case. Plaintiff argues that the  
11 full production of translated documents was not provided to  
12 defendant by September 5, 2006, because of the illness of the  
13 translator and an illness by one of plaintiff's counsel. Plaintiff  
14 also asserts that because it has now provided translations of a  
15 majority of what it deems are relevant documents, and the remaining  
16 documents are not relevant, its failure to comply with the  
17 September 5, 2006 deadline is, in essence, of no consequence - an  
18 argument of the "no harm, no foul" variety. For the reasons  
19 explained below, I reject plaintiff's arguments.

20 First, the translator's illness provided the basis for  
21 extending the deadline from August 11, 2006, to September 5, 2006.  
22 As noted in the August 15, 2006 Order granting plaintiff's motion  
23 to extend the August 11, 2006 deadline, the September 5, 2006  
24 deadline was a date of plaintiff's own choosing, and afforded  
25 plaintiff an extension eight times as long as the translator's  
26 illness. Thus, the translator's illness is not plausibly cited as  
27 a basis for plaintiff's failure to meet the newly extended deadline  
28 of September 5, 2006.

5 - FINDINGS & RECOMMENDATION/ORDER

1 Second, plaintiff's counsel John Stone states that he became  
2 ill in "early September, 2006," resulting in a one-week  
3 hospitalization starting September 16, 2006, followed by a  
4 physician-ordered home convalescence until October 9, 2006. Stone  
5 Oct. 16, 2006 Affid. at ¶ 21. Perhaps, if Stone were the only  
6 attorney employed by plaintiff, his illness might warrant  
7 consideration with respect to plaintiff's failure to produce all  
8 the translated documents by September 5, 2006. But, plaintiff  
9 employed two other lawyers who could have facilitated the  
10 production of the documents. Thus, all of the facts, including  
11 that plaintiff hired three attorneys to represent it in this  
12 action, show that Stone's illness was not a cause of plaintiff's  
13 failure to meet the court-ordered September 5, 2006 deadline.

14 As noted above, following the denial of the September 5, 2006  
15 motion to extend for failure to properly confer, plaintiff never  
16 renewed the motion. While the renewed motion would have likely  
17 been filed while Stone was ill, the fact that one of the other two  
18 attorneys representing plaintiff failed to renew it, reasonably  
19 leads to the conclusion that the non-renewal of the motion related  
20 to the client's non-cooperation, which is explained in the motions  
21 to withdraw.

22 In affidavits filed in support of the motion to withdraw,  
23 plaintiff's counsel note that plaintiff's principal, Mrs. Kim, was  
24 advised of the need for her to provide her "utmost cooperation" to  
25 advance the case, and that Mrs. Kim committed to provide counsel  
26 with financial resources, documents which could be authenticated,  
27 and witnesses who could support plaintiff's claims. Stone Oct. 26,  
28 2006 Affid. at ¶¶ 9-11; Tompkins Oct. 26, 2006 Affid. at ¶ 7; Cha

1 Oct. 26, 2006 Affid. at ¶ 7.

2 Stone further states that as of October 26, 2006, he had not  
3 been supplied with the financial resources, authenticated  
4 documents, or qualified witnesses with which to pursue plaintiff's  
5 case. Stone Oct. 26, 2006 Affid. at ¶ 16. He further states that  
6 no representative of plaintiff's has contacted local counsel to  
7 meet plaintiff's obligations in the case, or to explain why the  
8 necessary commitments have not been made. Id. Tompkins and Cha  
9 both state that because of plaintiff's lack of cooperation, and  
10 because plaintiff has not supplied the necessary financial  
11 resources, authenticated documents, or witnesses needed to pursue  
12 they case, they can no longer adequately represent plaintiff, and  
13 are unable to comply with the Court's orders. Tompkins Oct. 26,  
14 2006 Affid. at ¶ 8; Cha Oct. 26, 2006 Affid. at ¶ 8.

15 The record in the case shows that the Court's and counsels'  
16 expectations have been clearly communicated to plaintiff, but  
17 plaintiff has consistently failed to meet its obligations and own  
18 deadlines. Presently, plaintiff itself fails to provide an  
19 explanation for why it is not meeting its obligations to prosecute  
20 the case. While not necessarily obvious before, the most recent  
21 facts adduced in the case make it clear that the client has not  
22 been compliant since the beginning of the case. The blame for the  
23 failure to meet the Court's September 5, 2006 deadline for  
24 production of the translated documents, and other deadlines and  
25 obligations, is not on counsel, but squarely on the client. While  
26 counsel has done an admirable job in offering an explanation for  
27 the client's failings, it is of no use when the client's failings  
28 are the source of the continued problems in the case.

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1 Federal Rule of Civil Procedure 37(b)(2)(C), authorizes the  
2 Court to dismiss an action for violation of a discovery order. As  
3 recently explained by the Ninth Circuit,

4 Courts are to weigh five factors in deciding whether to  
5 dismiss a case for failure to comply with a court order:  
6 (1) the public's interest in expeditious resolution of  
7 litigation; (2) the court's need to manage its docket;  
8 (3) the risk of prejudice to the defendants; (4) the  
9 public policy favoring disposition of cases on their  
10 merits; and (5) the availability of less drastic  
11 sanctions.

12 In re Phenylpropanolamine (PPA) Prods. Liab. Litigation, 460 F.3d  
13 1217, 1226 (9th Cir. 2006) (internal quotation omitted). These  
14 factors are "not a series of conditions precedent," but a "way for  
15 a district judge to think about what to do." Id. (internal  
16 quotation omitted).

17 Here, plaintiff fails to respect the public's interest in  
18 expeditious resolution of litigation. "[D]elay in reaching the  
19 merits, . . ., is costly in money, memory, manageability, and  
20 confidence in the process." Id. at 1227. The delay caused by  
21 plaintiff's failure to comply with court orders in this case is  
22 unreasonable and without explanation.

23 Repeated non-compliance with case management orders seriously  
24 interferes with this Court's ability to manage its docket.  
25 Plaintiff's conduct has caused this Court to hold countless  
26 hearings, including requiring Mrs. Kim to appear in person with an  
27 interpreter so that the seriousness of plaintiff's conduct could be  
28 adequately explained directly by the Court, and to expend an  
inordinate amount of time resolving requests for extensions of  
time. Although the case has been pending for more than two years,  
it has failed to progress beyond the document discovery stage,



1 prolonging the Court's carrying of the case on its case inventory.

2 "A defendant suffers prejudice if the plaintiff's actions  
3 impair the defendant's ability to go to trial or threaten to  
4 interfere with the rightful decision of the case." Id. (internal  
5 quotation omitted). Additionally, "[p]rejudice is presumed from  
6 unreasonable delay. Id. at 1238. "Failing to produce documents as  
7 ordered is considered sufficient prejudice [and] [l]ate tender is  
8 no excuse." Id. at 1227. I find that defendant has been  
9 prejudiced by plaintiff's conduct.

10 While the public policy favoring disposition on the merits  
11 strongly counsels against dismissal, id. at 1228, "this factor  
12 lends little support to a party whose responsibility it is to move  
13 a case toward disposition on the merits but whose conduct impedes  
14 progress in that direction." Id. Such is the case here.

15 I recognize that dismissal is a drastic sanction. However,  
16 plaintiff has been explicitly warned both by the Court and by its  
17 counsel, that failure to comply with court-ordered deadlines would  
18 result in dismissal of the case. Additionally, when the record  
19 demonstrates a pattern of noncompliance and delay in prosecution  
20 from the inception of the case, and such noncompliance and delay  
21 has continued in the face of explicit warnings regarding the  
22 consequences of the conduct, I can think of no sanction short of  
23 dismissal that will cure the underlying problem which, as noted  
24 above, is based on the client's own failings.

25 Furthermore, plaintiff's argument that dismissal is  
26 unwarranted because most of the relevant translated documents have  
27 been provided, and the remainder are not relevant, does not suggest  
28 dismissal is inappropriate. The fact remains that the September 5,

1 2006 deadline, which applied to all translated documents, was not  
2 met and plaintiff has yet to provide an adequate explanation for  
3 its failure to meet that deadline. The fact remains that  
4 plaintiff's counsel all aver that plaintiff has failed to meet its  
5 obligations to them by not providing financial resources,  
6 documents, or witnesses in support of its case. And finally, it is  
7 not plaintiff's right to make a unilateral determination of the  
8 relevance of documents it has previously agreed to produce,  
9 especially when it never made an argument to the Court, before the  
10 expiration of the deadline for production, that some of the  
11 documents should not be produced on that basis.

12 Finally, given all of the facts recited in this and previous  
13 decisions in this case, and based on the case record as a whole,  
14 the only reasonable conclusion is that plaintiff's failure to  
15 cooperate with counsel, and with court orders, has been willful.  
16 Thus, considering all the relevant factors, I recommend that the  
17 case be dismissed. Plaintiff's counsel's motions to withdraw are  
18 granted.

#### 19 CONCLUSION

20 Defendant's renewed motion to dismiss (#121) should be granted  
21 with prejudice. Plaintiff's counsel's motions to withdraw (#128,  
22 131) are granted.

#### 23 SCHEDULING ORDER

24 The above Findings and Recommendation will be referred to a  
25 United States District Judge for review. Objections, if any, are  
26 due January 24, 2007. If no objections are filed, review of the  
27 Findings and Recommendation will go under advisement on that date.

28 / / /

1 If objections are filed, a response to the objections is due  
2 February 7, 2007, and the review of the Findings and Recommendation  
3 will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 9th day of January, 2007.

6  
7  
8 /s/ Dennis James Hubel  
9 \_\_\_\_\_  
Dennis James Hubel  
United States Magistrate Judge